RE MSA ZACHARIAH, EX PARTE BOON SIEW FINANCE BHD.

HIGH COURT, PENANG
TUAN T. SELVENTHIRANATHAN JC
[BANKRUPTCY 29-106-92]
15 MARCH 1993

BANKRUPTCY: Bankruptcy notice and affidavit - Defective - Non compliance in form and substance - Interest upon interest - Creditors petition premature - Stay of creditors petition.

A bankruptcy notice was served on the debtor on 10 February 1992. By letter dated 14 February 1992, solicitors for the debtor forwarded to the Court for filing copies of what was purported to be a notice from the debtor to oppose the said petition and an affidavit.

On 16 March 1992, a creditor's petition was presented against the debtor. Counsel for the debtor objected to the petition being heard, saying that the petition was premature.

Held:

[1] Although the affidavit was filed on behalf of the debtor within the seven day period specified in the bankruptcy notice for an application to be made to have it set aside, it was not filed for the purpose of Rule 95 as it gave no intimation whatsoever that it was filed on any of the grounds specified in Form 7. The purported notice filed with the affidavit appeared to be for the purpose of Rule 117, in which case it was filed prematurely. The affidavit and purported notice to oppose the petition filed on behalf of the debtor after the service of the bankruptcy notice and prior to the presentation of the creditor's petition were not documents filed for the purpose of Rule 95 as there was total non-compliance in form and in substance with the rule as well as with Form 7 which is to be followed pursuant to that rule.

[2] The charging of interest upon interest was an objection raised before and determined by the registrar in the proceedings for summary judgment in the civil suit. That was a final judgment, *albeit* it is being appealed against to a Judge in chambers. The appeal does not operate as a stay of the proceedings in which the appeal is brought, unless otherwise directed by the Court. Therefore the pending appeal in the civil suit to the Judge in chambers on the ground that the charging of interest upon interest is void and unenforceable cannot be used to mount a collateral attack on the summary judgment in these bankruptcy proceedings or to sustain the purported notice that the debtor disputes the petitioning creditor's debt.

[3] The claim that the bankruptcy notice and creditor's petition were presented prematurely having regard to the sale of the charged properties is without merit. Even without deducting the expenses of the public auction from the RM14 million, a debt of RM9,897, 338.92 was owing to the creditor at the time of the hearing of the petition. This balance was well above the statutory amount of RM2,000 which must be due and owing on which to base a creditor's petition.

[4] The application for a stay of the creditor's petition under s. 10(2) of the Act was misconceived as the provision enables the Court to stay any action, execution or other legal process against the property or person of the debtor after the presentation of a bankruptcy petition which means the Court can stay proceedings of the type specified other than the bankruptcy proceeding itself.

[Adjudicating and receiving orders granted].

Cases referred to:

Re Natarajan a/l Kuppusamy, ex parte Co-operative Central Bank Ltd. [1992] 3 CLJ 1638/[1992] 2 MLJ 468 ***(cit)***

Re Dr. G. Gopala Krishnan [1992] 1 CLJ 709 ***(cit)***

Soh Bok Yew v. Cindee Development Sdn. Bhd. [1977] 1 MLJ 242 ***(cit)***

Malayan Banking Bhd. v. Datuk Lim Kheng Khim [1992] 3 CLJ 1449/[1992] 2 MLJ 540 ***(cit)***

Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee [1988] 1 CLJ 155/[1988] 1 MLJ 304 at 306 ***(foll)***

Re Dato Loh Fook Yen, ex parte Malayan United Finance Bhd. [1989] 1 CLJ 187/[1988] 3 MLJ 499 ***(cit)***

Re Loh Kok Huah, ex parte Ban Hin Lee Bank Bhd. [1991] 3 CLJ 1817 ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), 3(2)(ii), 10(2)
Bankruptcy Rules 1969, rr. 95, (1), (2), 117
Interpretation Acts 1948 and 1967, s. 62
Rules of the High Court 1980, O. 56 r. 1(4)

Other sources referred to:
Aktin's **Encycolpaedia of Court Forms in Civil Proceedings,** 2nd Edn., Vol. 7, pp. 45 to 46
Williams and Muir Hunter on **The Law and Practice in Bankruptcy,** 19th Edn., p. 583

For the petitioning creditor - Karin Lim Ai Ching; M/s. Presgrave & Matthews
For the judgment debtor - Ahmad Johari Hamzah; M/s. AJ Hamzah & Co.
For the official assignee - Siti Fatimah bte Daud

JUDGMENT

T. Selventhiranathan JC:
On 28 January 1992 a bankruptcy notice [enclosure (2)] was issued against MSA Zachariah ("the debtor") by Boon Siew Finance Berhad ("the creditor") claiming RM23,897,338.92, being the judgment sum awarded in Civil Suit 22-236-91 in the High Court in Malaya at Penang ("the civil suit"). The bankruptcy notice was indorsed to the following effect:

> You are specially to note -
>
> That the consequences of not complying with the requisitions of this notice are that you will have committed an act of bankruptcy, on which bankruptcy proceedings may be taken against you.
>
> If, however, you have a counter-claim, set-off, or cross-demand which equals or exceeds the amount claimed by Boon Siew Finance Berhad in respect of the judgment, and which you could not set up in the action in which the said judgment was obtained, you must within seven (7) days apply to the Court to set aside this notice by filing with the registrar an affidavit to the above effect.

The bankruptcy notice was served on the debtor on 10 February 1992. By letter dated 14 February 1992, solicitors for the debtor forwarded to the court for filing copies of what was purported to be a "notice from the debtor to oppose the said petition" [enclosure (4)] and of an affidavit [enclosure (3)] affirmed by the debtor. The copy of this letter forwarding the two enclosures was also addressed to solicitors for the creditor and reads at the foot thereof:

> We enclose herewith a copy each (of) notice by debtor of intention to oppose petition and affidavit by way of service on you.

The purported notice to oppose the petition reads:

> In the matter of a bankruptcy petition presented against me, MSA Zachariah, the debtor named above of 144-I Jalan Anson, 10400 Pulau Pinang on 28 January 1992.
>
> I, the above debtor, do hereby give notice that I intend to oppose the debt that has been claimed by the creditor.

And the footnote to it reads:

> (This) notice by the debtor to set aside the petition has been filed by Messrs. AJ Hamzah & Co. ...

It becomes immediately clear from the letter forwarding the purported notice as well as from the purported notice itself that the debtor meant and gave the impression that it was thereby sought to oppose the creditor's petition (which had not been presented yet), which would make the purported notice one of intention to show cause against the petition within the meaning of rule 117 of the Bankruptcy Rules 1969 ("the Rules") and not one constituting an application to set aside the bankruptcy notice under r. 95(1) of the Rules, which application at any rate has to be made by an affidavit in Form 7 of the Appendix to the Rules.

However, the affidavit of the debtor filed with the purported notice referred to the bankruptcy notice dated 28 January 1992. By paragraph 3 of the affidavit, the debtor denied and disputed the allegation in the bankruptcy notice that he owed the creditor the sum of RM23,897,338.92. He deponed that the total amount claimed, which included interest upon interest, was void and could not be enforced. He finally deponed that the bankruptcy notice was "*bad ab initio*", and his solicitor would raise issues of fact and law (pertaining to this) on the date of hearing.

It also becomes immediately clear from the affidavit that it did not comply substantially with Form 7. The reasons for my so concluding appear later in this judgment.

On 16 March 1992, a creditor's petition [enclosure (7)] was presented against the debtor. The petition stated, *inter alia*, that the debtor was justly and truly indebted to the creditor in the sum of RM23,897,338.92, and that the creditor held security for the payment of the

said sum owed by the borrower, Syarikat Nusantara Pulau Pinang Berhad, through charges on specified pieces of land ("the charged properties") whose market value was estimated to be RM16.5 million if sold by public auction, the first auction at the said price having been abortive.

The petition further stated that the debtor, within six months before the date of the presentation of the petition, had committed the following act of bankruptcy, namely, that he had failed to comply with the requisitions of the bankruptcy notice dated 28 January 1992 (the act of bankruptcy having been committed on 18 February 1992).

The petition also contained an indorsement, *inter alia,* to the following effect:

> And you the said MSA Zachariah are to take notice that if you intend to dispute the truth of any of the statements contained in the petition, you must file with the registrar of this Court a notice showing the grounds upon which you intend to dispute the same, and send by post a copy of the notice to the petitioner three days before the date fixed for the hearing.

The petition was first fixed for hearing on 3 December 1992 before another High Court but was adjourned to 6 January 1993 for hearing before me. On that date, Miss Karin Lim and Encik Ahmad Johari appeared for the creditor and debtor respectively. Miss Karin Lim was ready to proceed with the hearing but Encik Ahmad Johari informed the court that he had objections to raise which would take some length of time for him to submit. As there was insufficient time to dispose of the matter that day (it being a full chambers as well as open-court hearing day and the time was already 5.15 p.m. then), the hearing of the petition was adjourned to 3 February 1993.

On the latter date, Encik Ahmad Johari applied for an adjournment to file a further affidavit on the ground that fresh facts had arisen in the matter. However, he needed time to file the affidavit as the debtor had been in poor health. The hearing of the petition was then adjourned further to 22 February 1993.

On the adjourned date, Encik Ahmad Johari for the first time objected to the petition being heard, saying that the petition was premature. He referred to r. 95 and submitted that the debtor had filed an affidavit [enclosure (3)] to set aside the bankruptcy notice and that no date had been fixed for the hearing thereof, which should have been done first. He cited *Re Natarajan a/l Kuppusamy, ex parte Co-operative Central Bank Ltd.* [1992] 2 MLJ 468 in support. In that case VC George J held that

> ... where the rule 95(1) affidavit is filed before the expiry of the statutory seven days given by the bankruptcy notice, the time for compliance with the notice is to be deemed to have been extended until the application has been heard and determined.

It was therefore contended that since the purported application to set aside the bankruptcy notice had not been heard and determined, the petition could not be heard.

Miss Karin Lim, on the other hand, submitted that any objection by the debtor to the bankruptcy notice must be made by way of Form 7 and that the affidavit filed purportedly under rule 95 was not in accordance with that form. Further, the contents of the affidavit "were not as provided for under the said Rules or form which provides that there must be a cross-claim which equals or exceeds the sum or if the sum is excessive" (sic). Therefore no valid objection had been filed by the debtor pursuant to r. 95. The debtor's only objection raised in the affidavit that compound interest could not be charged was not one of the grounds provided for by Form 7 or rule 95 for the objection to be valid. Furthermore, the issue of compound interest being charged had been raised by the debtor at the stage when summary judgment was sought in the civil suit. The debtor's contention was dismissed and judgment was granted in favour of the creditor. There had been no application for a stay of that judgment pending appeal.

Miss Karin Lim submitted further that any application pursuant to rule 95 must be made and heard within the stipulated time-frame. Otherwise the debtor must apply to the registrar for an extension of time. This the debtor had not done and it was too late for him to raise the issue now. In relation to the petition, the only way to object thereto was by way of rule 117, and since no notice of intention to dispute the petition had been properly filed under that rule, the debtor was precluded from raising any objections now.

It was contended further that the receipt of the proceeds of the sale of the charged properties did not invalidate these bankruptcy proceedings. The auction of the charged properties was held on 18 November 1992. The ten percent deposit of RM1.4 million of the sale price was received by the court and had not yet been paid out to the creditor. The balance RM12.6 million of the sale price was received by the creditor on 12 February 1993. The bankruptcy notice and the creditor's petition were all filed before the receipt of these monies and so the proceedings were not invalidated. In any event, no objections were raised on the receipt of the sale proceeds in the notice of intention to oppose the petition and in the affidavit in support thereof, and it was therefore too late for the debtor to object now.

She cited in support of her various contentions *Re Dr. G. Gopala Krishnan* [1992] 1 CLJ 709 and other cases (see bundle of authorities appended to creditor's outline of submission).

Encik Ahmad Johari submitted in reply that the debtor had not raised a number of facts in relation to the petition. He referred to the further affidavit [enclosure (10)] of the debtor which had been filed on 18 February 1993. He said an appeal was pending in respect of the judgment on which the bankruptcy notice was based and that, that appeal had not been heard. Numerous issues raised in the appeal were favourable to the debtor. Pending the disposal of the appeal, the bankruptcy proceedings may become redundant (sic). The properties in question had been charged to the creditor and, on 18 November 1992, they had been sold for RM14 million. This fact had not been disclosed by the creditor, and the disposal of the property resulted in the judgment debt being reduced. He submitted that the court must decide on the application of the debtor under rule 95 before the creditor could file the creditor's petition. He cited *Soh Bok Yew v. Cindee Development Sdn. Bhd.* [1977] 1 MLJ 242 in support. In his view, the creditor's petition was premature and the debtor therefore had not filed any affidavit to oppose it. His application to set aside the bankruptcy notice had not been heard and disposed of. He referred to *Malayan Banking Bhd. v. Datuk Lim Kheng Khim* [1992] 2 MLJ 540 to support his contention. He stated that no date had been fixed for the hearing of the application under rule 95 and therefore no act of bankruptcy had been committed.

The court adjourned the matter to 8 March 1993 for decision, indicating to the parties (when asked) that they could in the meantime submit any further authorities in the usual way before then if the same could be of assistance.

By letter dated 2 March 1993, Miss Karin Lim made a further written submission and extended a copy thereof to the solicitors for the debtor. When the matter came on for decision on the 8th, Encik Ahmad Johari raised strenuous objections to the further written submission of Miss Karin Lim and stated that he required time to reply thereto. Miss Karin Lim, on the other hand, indicated she had some further authorities which would be of assistance to the court. (These authorities were sent in later that day and also copied to solicitors for the debtor). The court then adjourned decision on the matter to the 15th, giving Encik Ahmad Johari up to the 11th to submit his further written reply. He had indicated on the 8th that he needed only one or two days to prepare his reply but the court gave him until the 11th to do so. However, no reply has been received until today and it would appear that Encik Ahmad Johari has elected not to submit any. In these circumstances, I now proceed to give my decision.

The affidavit of the debtor [enclosure (3)] filed purportedly under rule 95 did not at all contain any of the grounds on which to found an application to set aside a bankruptcy notice as set out in the form prescribed for the filing thereof in the Rules (Form 7). The indorsement on the bankruptcy notice [enclosure (2)] clearly states the grounds on which an application could be made to set the notice aside. These are that the debtor has a counter-claim, set-off or cross-demand which equals or exceeds the amount claimed by the creditor in respect of the judgment, and which the debtor could not set up in the action in which the judgment was obtained. In these circumstances, Form 7 prescribes the mode as well as the bases upon which the debtor could apply to set aside the bankruptcy notice - either that he had satisfied the judgment debt claimed, or that he has a counter-claim (or set-off or cross-demand) for a specified sum being a sum equal to (or exceeding) the claim of the creditor. Form 7

further requires the debtor to affirm that he could not set up the counter-claim (or set-off or cross-demand, as the case may be) in the action in which the judgment was obtained against him.

Furthermore, the letter of the solicitors for the debtor dated 14 February 1992 forwarding the purported notice from the debtor of intention to oppose the **petition** (emphasis added) as well as the affidavit made no advertence whatsoever to rule 95, directly or indirectly. Neither did it indicate to the registrar that the affidavit was filed under that rule nor did it request the registrar to fix a date for hearing the application pursuant to the affidavit. The first intimation of any purported application having been made under rule 95 was given only on 22 February 1993 when the petition itself came up for hearing after three adjournments. The debtor had remained silent for more than one year after filing the notice of intention to oppose the **petition** when only the bankruptcy notice had been filed.

However, that purported notice of intention to oppose the petition appears to have followed in form the notice (Form 16) required to be filed under rule 117, which notice is filed only after the presentation of the creditor's petition. Again, the substance of the notice was not in compliance with Form 16 as it only stated that the debtor proposed to oppose the debt claimed by the creditor, which ground should properly have been (and was) raised in the proceedings for summary judgment in the civil suit.

In these circumstances, although the affidavit was filed on behalf of the debtor within the seven-day period specified in the bankruptcy notice for an application to be made to have it set aside, it was not filed for the purpose of rule 95 as it gave no intimation whatsoever that it was filed on any of the grounds specified in Form 7. The purported notice filed with the affidavit appeared to be for the purpose of rule 117, in which case it was filed prematurely. I found as a fact that the affidavit and purported notice to oppose the petition filed on behalf of the debtor after the service of the bankruptcy notice and prior to the presentation of the creditor's petition were not documents filed for the purpose of rule 95 as there was total non-compliance in form and in substance with that rule as well as with Form 7 which is to be followed pursuant to that rule. See Williams and Muir Hunter on "**The Law and Practice in Bankruptcy**", 19th Edn., at p. 583 setting out the position in a situation under the equivalent provision of our rule 95:

> ... if the affidavit does not show on the face of it that the counterclaim, set-off or cross-demand equals or exceeds the judgment debt, **the rule does not come into operation;** ... (emphasis added).

See also **"Atkin's Encyclopaedia of Court Forms in Civil Proceedings",** 2nd Edn., Vol. 7 at pp. 45 to 46:

> If the debtor files an affidavit within the time specified in the bankruptcy notice stating that he has a counterclaim, set-off or cross-demand, the filing operates as an application to set aside the bankruptcy notice. The counterclaim, set-off or cross-demand must be mutual and due in the same right, **and unless the affidavit shows that the counterclaim, set-off or cross-demand equals or exceeds the judgment debt and that it could not be set up in the action, the filing will be inoperative and the case must be treated as if no affidavit had been filed** (emphasis added).

The judgment of the Supreme Court in *Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee* [1988] 1 MLJ 304 at 306, per Lee Hun Hoe, CJ (Borneo) (as he then was), is pertinent here:

> ... The burden of proof is on the respondent to show by the affidavit or affidavits three things which were stated clearly by Warner J in *Re a debtor (No. 75N of 1982, Warrington), ex parte The Debtor v. National Westminster Bank* [1983] 3 All ER 545, 553 as follows:
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> > ... First, the affidavit or affidavits must show that he has a cross-demand against the creditor which is genuine. To satisfy that requirement, the cross-demand must be put forward in good faith and must have a reasonable probability of success, or, as it has also been expressed, must give rise to a triable issue. In the latter respect, there is no hard and fast rule as to the degree of proof required. It depends in each case on the particular facts and circumstances of that case.
> >
> > Second, the affidavit or affidavits must show that the cross-demand could not

> have been set up in the action in which the judgment relied on by the creditor was obtained.
>
> Third, the affidavit or affidavits must show that the cross-demand need not be for a liquidated sum or even for a sum of money at all. But it must be capable of being quantified in terms of money and the affidavit or affidavits must quantify it.

In this context, useful reference may also be made to rule 4 of the Rules which reads:

> The forms in the Appendix, where applicable, and where they are not applicable, forms of the like character, with such variations as circumstances may require, shall be used. Where such forms are applicable any costs occasioned by the use of any other or more prolix forms shall be borne by or disallowed to the party using the same unless the court shall otherwise direct.

Besides rule 4, section 62 of the Interpretation Acts 1948 and 1967 provides that an instrument or other document purported to be in a prescribed form shall not be invalidated by reason of any deviation from the form **if the deviation has no substantial effect and is not calculated to mislead** (emphasis added). In the present proceedings, the deviation of the affidavit filed from Form 7 certainly had substantial effect and was calculated to mislead.

The affidavit and the purported notice filed on 14 February 1992 did not in any way show on what ground the debtor was applying to set aside the bankruptcy notice within the meaning of the form prescribed for that purpose, namely Form 7, that is whether the debtor had a counter-claim or set-off or cross-demand in the action in which judgment had been obtained and that he could not have set up the same in the action. In addition to that, if the affidavit and purported notice were indeed filed pursuant to rule 95, it was incumbent upon the debtor to apply to the registrar to fix a date for the hearing of the application to set aside the bankruptcy notice. Here not a word was breathed of such an application until 22 February 1993 when Encik Ahmad Johari raised this issue for the first time. In fact, on 3 February 1993, he applied for an adjournment of the hearing of the creditor's petition saying that he needed time to file an affidavit pertaining to fresh facts which had arisen. He made no advertence whatsoever to any purported application under rule 95 or request that it be heard. In the light of these facts, there is no application proper before the court for the purpose of proceedings under rule 95 and I therefore dismiss with costs the application of the debtor to hear his purported application to set aside the bankruptcy notice under rule 95.

Having said that, I now proceed to consider the creditor's petition [enclosure (7)], the contents of which have been summarised earlier in this judgment.

Miss Karin Lim contended that the debtor had no *locus standi* to oppose the petition as no notice had been filed pursuant to rule 117. The purported notice filed on 14 February 1992 was premature as it was filed before the petition was served. However, even if the purported notice was allowed as an objection to the creditor's petition, there were no grounds in it upon which to base a valid objection. The question of whether compound interest could be charged had been raised before and determined by the registrar (in the proceedings for summary judgment in the civil suit) and it therefore could not be used as the basis for any objection.

As for the sale of the charged properties, Miss Karin Lim stated that this had not taken place when the bankruptcy notice and the creditor's petition had been filed and further the judgment sum under both were the same. The creditor's petition did make reference to the charged properties and the reserve price of RM16.5 million. Hence the debtor was aware of this and did not challenge the judgment sum within the seven-day period stipulated in the bankruptcy notice, which he could have done under s. 3(2)(ii) of the Bankruptcy Act 1967 ("the Act"): *Re Dato Loh Fook Yen, ex parte Malayan United Finance Bhd*. [1988] 3 MLJ 499.

She submitted that even if the notice of intention to oppose the petition was allowed to stand under rule 117, there was no validity in it, and therefore adjudicating and receiving orders should be granted.

Encik Ahmad Johari submitted that the court had only today decided on the application to set aside the bankruptcy notice and it is only after that, that the act of bankruptcy can be

said to be committed and the creditor's petition presented. The debtor needed time to file notices under rule 117 of the Rules and s. 3(2)(ii) of the Act. The amount claimed in the bankruptcy notice and the petition was a mistake and/or was wrong. He referred to the further affidavit of the debtor [enclosure (10)] and asked that it be treated as an affidavit to oppose the petition or an application to be given time to file an affidavit in compliance with Form 16 of the Appendix to the Rules. Only after affidavits had been filed pursuant to Form 16 could a date be fixed for hearing the petition.

In the alternative Encik Ahmad Johari urged the court to exercise its discretion under s. 10(2) of the Act and order a stay of the petition on the ground that the civil suit in which the summary judgment had been obtained was under appeal to the judge. The charged properties had been auctioned off for RM14 million. The amount claimed in the bankruptcy notice and the petition was not the balance due but the whole judgment sum. The debtor needed an opportunity to indicate that the amount owing had been substantially reduced. The debtor only wanted time to file an affidavit or to be allowed "a stay of execution for the parties to sort out the matter". Furthermore, the debtor was taken by surprise by the arguments of the creditor and he should be given an opportunity to comply with rule 117. He asked the court to exercise its discretion and grant an adjournment.

Miss Karin Lim submitted in reply that the preliminary objection taken by the debtor to the petition on the ground that his application to set aside the bankruptcy notice had not been heard had been dismissed because rule 95 had not come into operation. The act of bankruptcy was therefore committed on 18 February 1992. The proper procedure to have been adopted would have been for the debtor to have filed the notice of dispute under rule 117.

On the question of stay "to sort out the matter", she submitted that this course of action was available to the debtor much earlier and should have been adopted. As for the jurisdiction of the court to make the adjudicating and receiving orders sought even though the judgment sum was reduced substantially after the sale of the charged properties, she submitted that the court could still make the orders as the reduced sum was very much above the statutory sum upon which a bankruptcy notice and creditor's petition could be presented.

Encik Ahmad Johari then applied again for these proceedings to be stayed under s. 10 of the Act and not for a stay of the judgment in the civil suit. According to him, as an appeal was pending in the civil suit, the court could only decide on the creditor's petition after the appeal had been disposed of.

At the close of arguments I ruled as follows:

There was no application proper within rule 95 to set aside the bankruptcy notice (see the earlier part of this judgment). No action was taken to have the purported application by way of affidavit [enclosure (3)] to set aside the bankruptcy notice heard within the period referred to in rule 95(2) and neither was an extension of time for the application to be heard sought. The act of bankruptcy was committed on 18 February 1992. Even taking into account the application by way of affidavit [enclosure (3)] to set aside the bankruptcy notice, the notice by the debtor of intention to oppose the petition [enclosure (4)] and the further affidavit of the debtor [enclosure (10)] for the purpose of rule 117, I find that no cause has been shown thereby against the petition and I therefore make adjudicating and receiving orders in terms of the petition.

My reasons for so ruling are as follows. Rule 117 reads:

> Where a debtor intends to show cause against a petition he shall file a notice with the registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard.

Form 16 contains the notice referred to in rule 117. The bases or grounds of the notice are that the debtor disputes the petitioning creditor's debt or the act of bankruptcy. The affidavit of the debtor here [enclosure (3)] states that he denies and disputes owing the judgment sum to the creditor as the charging of interest upon interest is void and unenforceable. The notice by the debtor of intention to oppose the petition [enclosure (4)] states that the debtor proposes to oppose the debt claimed by the creditor. The further

affidavit of the debtor [enclosure (10)] is to the effect that the judgment obtained against him in the civil suit is not a final judgment as it has been appealed against and the appeal has not been heard. Furthermore, the charged properties had been sold by way of a public auction on 18 November 1992 for RM14 million and the issuance of the bankruptcy notice was premature in the circumstances.

It is my view that the reasons advanced in the three documents [enclosures (3), (4) and (10)] filed on behalf of the debtor are not sufficient grounds to show cause against the petition within the meaning of rule 117. The charging of interest upon interest was an objection raised before and determined by the registrar in the proceedings for summary judgment in the civil suit. That was a final judgment, *albeit* it is being appealed against to a judge in chambers. The appeal does not operate as a stay of the proceedings in which the appeal is brought, unless otherwise directed by the court [that is, the court which is seized of the civil suit and not the court hearing the creditor's petition in the bankruptcy proceedings]: see O. 56, r. 1(4) of the Rules of the High Court 1980. Therefore the pending appeal in the civil suit to the judge in chambers on the ground that the charging of interest upon interest is void and unenforceable cannot be used to mount a collateral attack on the summary judgment in these bankruptcy proceedings or to sustain the purported notice [enclosure (4)] that the debtor disputes the petitioning creditor's debt.

In this context it would not be inappropriate to refer to *Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee (supra)* again at p. 305 of the report:

> In the exercise of his jurisdiction in bankruptcy proceedings, the learned Judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice, it was laid down as early as 1893 that the court could not go behind the judgment. See *in re Easton* [1893] 10 Mor 111; 9 TLR 409. Even if there has been an irregularity in the service of the notice of sale, it is not open to the respondent in this case to challenge the execution proceedings. Under s. 3(1)(i) of the Bankruptcy Act 1967, a debtor commits an act of bankruptcy if a creditor has obtained a final judgment for any amount and has served on him a bankruptcy notice requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment. He has seven days after service of the notice to comply with the requirements of the notice or satisfy the court that he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained. Having regard to these provisions, it was wrong for the learned Judge to strike out the creditors' petition.
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> Further, we do not think it is open to the learned Judge in the exercise of his jurisdiction in bankruptcy proceedings to strike out the creditors' petition by disputing the validity of the orders made in earlier execution proceedings when the orders had not been set aside. This is particularly so when there has been no application by the respondent to set aside the execution orders. The two orders were made on 25 January 1980 and 20 June 1980. By an order dated 25 January 1980, the shares in the respondent's name were taken in execution and issued in the sheriff's name. Unless and until this order has been set aside, it is binding and effective. The respondent has not at any time taken any step to have it set aside.

As Lord Diplock, delivering the judgment of the Privy Council, in *Isaacs v. Robertson* [1984] 3 All ER 140 explained in the following passage at p. 143:

> Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside ....

After pointing out that in neither of the two Privy Council cases of *Marsh v. Marsh* [1945] AC 271 and *MacFoy v. United Africa Co. Ltd.* [1962] AC 152 nor in any other case could it be found that any order of a court of unlimited jurisdiction had been held to fall in a category of court orders that could be ignored because they were void *ipso facto* without there being any need for proceedings to have them set aside, he went on to stress:

> ... The contrasting legal concepts of voidness and voidability form part of

the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular, it can be set aside by the court that made it on application to that court; if it is regular, it can only be set aside by an appellate court on appeal if there is one to which an appeal lies.

An irregularity or formal defect in the judgment is no sufficient reason for going behind it: *Re Beauchamp* [1904] 1 KB 572. As a general principle, the validity of the judgment debt will only be inquired into when there is evidence of fraud or collusion or miscarriage of justice: *Re Flatau* [1889] 22 QBD 83; *Re Howell* [1915] 84 LJKB 1399.

The claim that the bankruptcy notice and creditor's petition were presented prematurely having regard to the sale of the charged properties is without merit. The bankruptcy notice was issued on 28 January 1992. The creditor's petition was presented on 16 March 1992. The judgment sum of RM23,897,338.92 was the debt owing to the creditor as of 28 January 1992 and this debt was not reduced in any way until the charged properties were sold on 18 November 1992 for RM14 million. Even without deducting the expenses of the public auction from the RM14 million, a balance debt of RM9,897,338.92 (not including interest accruing after 28 January 1992) was owing to the creditor at the time of the hearing of the petition. This balance was well above the statutory amount of RM2,000 which must be due and owing on which to base a creditor's petition. Therefore no useful purpose would have been served in granting an adjournment to the debtor merely to affirm a further affidavit to show that the debt owing had been reduced by about RM14 million, especially so when the debtor had already adverted to the charged properties being sold for that amount in paragraph 5 of his further affidavit [enclosure (10)] filed on 18 February 1993. I am fortified in this regard by the decision of Datuk Mohamed Dzaiddin J (as he then was) in the case of *Re Loh Kok Huah, ex parte Ban Hin Lee Bank Bhd.* [1991] 3 CLJ 1817 where it was held as follows:

[1] The debtor cannot raise the issue that the judgment sum stated in the creditor's petition was incorrect unless he has given notice to the bank under s. 3(2)(ii) of the Bankruptcy Act 1967 (the Act).

[2] The debtor had knowledge of the application for an order for sale of the charged property and therefore should have applied to set aside the bankruptcy notice disputing the validity of the said notice. However, this issue of correct amount was only raised at the hearing of the creditor's petition on 20 May 1991. The bankruptcy notice cannot be invalidated by reason of the mistake as to the sum specified therein.

[3] When the creditor's petition was filed on 9 April 1990, the bank (judgment creditor) had not received the proceeds of the sale; therefore the amount claimed in the bankruptcy notice was the sum actually due from the debtor to the bank as at the time when the creditor's petition was filed.

[4] The court can still make a receiving order even if the debt had been substantially reduced, as long as the debt exceeded the statutory minimum of RM2,000 and remains due and owing at the date of the hearing of the petition.

See also *Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee (supra)* at p. 306 of the report.

The application by Encik Ahmad Johari for a stay of the creditor's petition under s. 10(2) of the Act was misconceived as that provision enables the court to stay any action, execution or other legal process against the property or person of the debtor after the presentation of a bankruptcy petition which means the court can stay proceedings of the type specified other than the bankruptcy proceedings itself. In the circumstances, I cannot, with respect, place the construction on that provision that Encik Ahmad Johari sought.

Therefore having taken all relevant factors into consideration, I make adjudicating and receiving orders in terms of the creditor's petition [enclosure (7)].